

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,	)	No. P1300CR20081339
	)	
Plaintiff,	)	Div. 6
	)	
vs.	)	<b>RESPONSE TO STATE'S</b>
	)	<b>MOTION IN LIMINE RE:</b>
STEVEN CARROLL DEMOCKER,	)	<b>ANONYMOUS EMAIL</b>
	)	
Defendant.	)	
	)	
	)	
	)	

Steven DeMocker, through his counsel undersigned, herewith responds to the State's May 24, 2010 Motion in Limine seeking to preclude any reference to an anonymous email sent to counsel in June 2009. For the reasons set forth in the following Memorandum, this motion is both untimely and without merit and should be summarily denied.

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## MEMORANDUM

This motion was filed on May 24, 2010 without prior leave of Court, well past the deadline<sup>1</sup> for the filing of all pretrial motions set forth in Rule 16.1(b). It deals with a subject that was known to the State in June 2009, and addresses the Constitutional right of Mr. DeMocker to present the third party culpability defense he formally noticed on April 10, 2010. There is no valid reason advanced by the State for the lateness of this motion, nor does one exist. Accordingly, pursuant to Rule 16.1(c) it should be precluded.

Should this Court for some reason conclude that the motion is timely, it should still deny it on the merits.

The email in question was sent to counsel undersigned and Mr. Butner in June, 2009 by an anonymous source. It purports to describe in detail the circumstances surrounding the death of Carol Kennedy, and provides a graphic account of her murder by persons other than Mr. DeMocker. Law enforcement aggressively investigated this entire incident and eventually concluded only that the author was successful in concealing his identity. They traced the source of the email to an Internet café in north Phoenix, but there the trail went cold. As a result, the authenticity and accuracy of the information it contains cannot be verified nor discounted. The fact that it may be at first blush hearsay does not mean that it may not form the basis for a third party culpability defense. A recent Division 2 opinion thoroughly analyzes the law in this area, and holds

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<sup>1</sup> 20 days prior to trial.

1 that the basic standard for admissibility of such evidence set forth in *State v. Gibson*,  
2 202 Ariz. 321 (2002) controls. *State v. Machado*, 2 CA-CR 2008-0205 (Ariz. App. 4-  
3 29-2010). *Gibson* holds that the proffered evidence must clear only two hurdles to be  
4 admissible: it must be relevant, meaning it must tend to create reasonable doubt as to the  
5 defendant's guilt, and, in accordance with Rule 403, the probative value of the evidence  
6 must not be substantially outweighed by the risk that it will cause undue prejudice,  
7 confusion of the issues, or delay. *Machado* goes further and says that such evidence is  
8 not subject to the test of Rule 404(b), and that only Rules 401, 402 and 403 govern.  
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11 Here, the evidence clearly meets the threshold established in *Gibson* and  
12 *Machado*. It creates reasonable doubt as the Mr. DeMocker's guilt, and as the State is  
13 fond of saying in this case, creates only prejudice to their case, not unfair or undue  
14 prejudice. It will be up to the jury to make what it will of this account, and the State is  
15 free to attack it from all sides. However, Mr. DeMocker's Sixth Amendment right to  
16 present a defense remains inviolate, as it must. As *Machado* says "[T]he Constitution  
17 guarantees criminal defendants 'a meaningful opportunity to present a complete  
18 defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), quoting *California v.*  
19 *Trombetta*, 467 U.S. 479, 485 (1984). This right is secured by the Confrontation Clause  
20 of the Sixth Amendment, *Davis v. Alaska*, 415 U.S. 308, 315 (1974), the Compulsory  
21 Process Clause of the Sixth Amendment, *Holmes v. South Carolina*, 547 U.S. 319, 324  
22 (2006); *Washington v. Texas*, 388 U.S. 14, 18-19(1967), the Due Process Clause of the  
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1 Fourteenth Amendment, *Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3, 302 (1973);  
2 State v. Oliver, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988), and article II, §§ 4 and 24  
3 of the Arizona Constitution. As the United States Supreme Court has observed, "Few  
4 rights are more fundamental than that of an accused to present witnesses in his own  
5 defense." *Chambers*, 410 U.S. at 302." *Machado*, at p. 8.  
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7  
8 **CONCLUSION**

9 The motion is untimely, without merit, and should be summarily denied.

10 Respectfully submitted this 15<sup>th</sup> day of June, 2010

11  
12  
13 By: 

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23 **ORIGINAL** of the foregoing hand delivered for  
24 filing this 15<sup>th</sup> day of June, 2010, with:

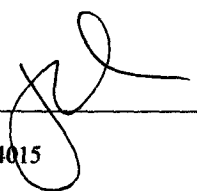
25 Jeanne Hicks  
26 Clerk of the Court  
27 Yavapai County Superior Court  
28 120 S. Cortez  
Prescott, AZ 86303

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**COPIES** of the foregoing hand delivered this  
this 1<sup>st</sup> day of June, 2010, to:

The Hon. Thomas B. Lindberg  
Judge of the Superior Court  
Division Six  
120 S. Cortez  
Prescott, AZ 86303

Joseph C. Butner, Esq.  
Prescott Courthouse basket

  
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